

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**CHRISTINA COLLING**

Claimant

VS.

## BOEING MILITARY AIRPLANES

Respondent

AND

## AETNA CASUALTY & SURETY

Insurance Carrier

AND

**KANSAS WORKERS COMPENSATION FUND**

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Docket No. 170,456

## ORDER

Claimant appeals from a July 16, 1996 post-award Order upon review and modification by Administrative Law Judge John D. Clark.

## APPEARANCES

Claimant appeared by her attorney, Steven R. Wilson of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Frederick L. Haag of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Kurt W. Ratzlaff of Wichita, Kansas. There were no other appearances.

## RECORD AND STIPULATIONS

The Appeals Board considered the record and stipulations set forth in the Award of the Administrative Law Judge, together with the transcript of the July 16, 1996 hearing on claimant's Motion for Review and Modification and the documents contained in the administrative file maintained by the Division of Workers Compensation.

## ISSUES

The Administrative Law Judge denied claimant's request that respondent and its insurance carrier be ordered to provide additional medical treatment under the direction of Jay Stanley Jones, M.D., for claimant's hands, arms, shoulders and back complaints. As this was a post award proceeding, claimant requested the Administrative Law Judge also grant counsel for claimant a reasonable attorney fee to be paid by the respondent and its insurance carrier.

In her request for Appeals Board review, claimant raises the following issues:

- (1) Whether the Administrative Law Judge exceeded his jurisdiction in denying the post-award medical requested at the hearing held on July 16, 1996.
- (2) Whether the Administrative Law Judge exceeded his jurisdiction in refusing or neglecting to order attorney fees per K.S.A. 44-536.

Respondent counters that the Order is not subject to review by the Workers Compensation Appeals Board.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, and in particular the transcript of the July 16, 1996 motion hearing and the transcript of the February 2, 1995 motion hearing, together with the exhibits attached thereto, and the briefs of the parties, the Appeals Board finds:

For the reasons stated below, the Order of the Administrative Law Judge is reversed.

The Order by the Administrative Law Judge followed a hearing on claimant's post-award Application for Review and Modification and Attorney Fees. Claimant seeks additional medical treatment. This claim stems from a repetitive use type injury claimant suffered while working for respondent. Her last date worked was October 15, 1992. Claimant's last authorized medical treatment was with Dr. Jay Stanley Jones on or about January 6, 1995. Dr. Jones was de-authorized by the Administrative Law Judge by Order of February 2, 1995. On February 7, 1996 claimant received an award based upon a 48 percent permanent partial disability to the body as a whole. Future medical treatment was awarded "upon proper application to the Director." Respondent admits that claimant preserved her right to seek future medical benefits. However, respondent disputes that claimant has met her burden of proving her need for medical treatment.

Claimant did not return to work with respondent after she was released by Dr. Jones. Since then claimant has not worked. At the time of the October 10, 1995 regular hearing, claimant described ongoing problems with her hands, arms, shoulders and upper back. In her February 2, 1995 testimony, claimant described similar problems. The records of Dr. Jones introduced by respondent as exhibits to that hearing also refer to ongoing symptoms of fibromyalgia. In his January 4, 1995 notes, Dr. Jones recommended a referral for pain management. This referral was denied and Dr. Jones was subsequently de-authorized as the authorized treating physician.

Respondent contends that in order for claimant to be entitled to additional medical benefits, she must show that her present complaints are greater than those complaints and problems claimant had when she was rated and released by Dr. Jones in May 1995. Only the claimant testified at the July 16, 1996 hearing. Claimant described her symptoms but did not specifically indicate whether they are worse now than they were at the time of the award. According to claimant, the over-the-counter pain medication she is using is not working and she needs something stronger. She seeks authorization to return to Dr. Jones in order to obtain a prescription for pain medication. Although claimant returned on her own to Dr. Jones before the hearing, the record does not contain any report by Dr. Jones from that examination.

We will now address the specific issues raised by the parties, beginning with the respondent's motion to dismiss claimant's application for Appeals Board review.

Post-award hearings before an administrative law judge which were held pursuant to a Form E-3 Application for Preliminary Hearing on issues relating to medical treatment and/or temporary total disability benefits are treated as preliminary hearing orders for purposes of Appeals Board jurisdiction. Therefore, before the Appeals Board can take jurisdiction of the appeal, there must exist a disputed issue concerning whether:

- (1) The employee suffered an accidental injury;
- (2) The injury arose out of and in the course of the employee's employment;
- (3) Notice was given or claim timely made; or
- (4) Certain legal defenses apply.

See K.S.A. 44-534a, as amended. Furthermore, K.S.A. 44-551(b)(2)(A), as amended, provides that the Appeals Board cannot take jurisdiction over a preliminary order unless it is alleged that the administrative law judge somehow exceeded his jurisdiction in granting or denying benefits. Under K.S.A. 44-534a(a)(2), as amended, the four above-listed issues are considered jurisdictional. However, the July 16, 1996 Order by Judge Clark pertains to and arises from a Motion for Review and Modification pursuant to K.S.A. 44-528. Accordingly, the issue concerning claimant's entitlement to post-award medical treatment was not decided pursuant to the summary hearing procedure provided for under K.S.A. 44-534a, as amended, but instead is a final order. This appeal, therefore, does not arise under the limited jurisdiction afforded the Appeals Board for an appeal from a preliminary hearing. Instead, this appeal is subject to de novo review without limitation as to the issues raised.

Respondent presented no evidence. Only claimant testified as to her present symptoms and need for additional medical treatment. Uncontradicted testimony which is not improbable or unreasonable cannot be disregarded in a workers compensation case. Also, unless it is shown to be untrustworthy, uncontroverted evidence should usually be regarded as conclusive. See Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, Syl. ¶5, 573 P.2d 1036 (1978). From the record as it presently exists, the Appeals Board finds claimant's testimony credible as to her need for additional medical treatment.

However, given the length of time that has passed since the accident, and since claimant last received authorized medical treatment for her injury, it would have been better had medical evidence been offered to establish a causal connection between her present complaint and the work-related injury. Nevertheless, claimant has satisfied her burden of proving that her present need for medical treatment is a direct and natural result of her original work-related injury. The Order denying medical benefits should, therefore, be reversed and the matter remanded to the Administrative Law Judge for a determination as to an authorized treating physician.

In her Application for Review and Modification and Attorney Fees, claimant states:

“Counsel also requests attorney fees pursuant to K.S.A. 44-536, since this is a Post Award matter.”

However, the hearing transcript is silent on the issue of attorney fees. No argument or testimony was presented to the Administrative Law Judge in support of the attorney fees request. Judge Clark’s Order is silent in this regard. Inasmuch as we cannot determine from the record the amount of time expended by counsel in pursuing this matter, this issue must also be remanded to the Administrative Law Judge for a determination of reasonable fees.

There is no mention in the record as to the amount of attorney fees requested. The Appeals Board, therefore, cannot determine whether this issue goes solely to the amount to be awarded or if there is also a question regarding the propriety of any award of attorney fees. K.S.A. 1991 Supp. 44-536(g) provides in pertinent part:

“In the event any attorney renders services to an employee or the employee’s dependents, subsequent to the ultimate disposition of the initial and original claim, and in connection with an application for review and modification, a hearing for vocational rehabilitation, a hearing for additional medical benefits, or otherwise, such attorney shall be entitled to reasonable attorney fees for such services . . . .”

The Appeals Board finds the July 16, 1996 proceeding to have been “subsequent to the ultimate disposition of the initial and original claim” and to have been a “hearing for additional medical benefits.” Accordingly, claimant’s attorney fees at the expense of respondent and its insurance carrier are recoverable.

Claimant’s counsel now seeks additional attorney fees for services provided in connection with this appeal. This request should likewise first be presented to the Administrative Law Judge for a determination of a reasonable amount for such services.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the July 16, 1996 Order of Administrative Law Judge John D. Clark should be, and is hereby, reversed, as to the denial of additional medical benefits, and remanded to the Administrative Law Judge for a determination of an authorized treating physician and award for reasonable attorney fees.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of September 1996.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Steven R. Wilson, Wichita, KS  
Frederick L. Haag, Wichita, KS  
Kurt W. Ratzlaff, Wichita, KS  
John D. Clark, Administrative Law Judge  
Philip S. Harness, Director